Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KAREN SUTTON AND KIMBERLY HINTON,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where an airline pilot's uncorrected vision is so poor that it constitutes a physical impairment under the Americans with Disabilities Act, is the pilot nevertheless excluded from protection under the Act if her vision can be corrected?

2. Should courts defer to the EEOC Interpretive Guidance that disabilities should be analyzed in their uncorrected state?

3. Is a commercial pilot regarded as disabled by a major airline that refuses to employ her as a pilot for that airline due to her poor vision?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Karen Sutton and Kimberly Hinton ("Petitioners" or "Pilots") respectfully request that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the Tenth Circuit entered on November 26, 1997. The Tenth Circuit affirmed the order of the United States District Court for the District of Colorado dismissing the Pilots' claims against Respondent United Air Lines, Inc. ("United").

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 130 F.3d 893, and is reproduced in the Appendix at A-1. The Order of the United States District Court for the District of Colorado is reproduced in the Appendix at A-27.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1997. (Appendix A-1.) Pilots' Petition for Rehearing and Suggestion for Rehearing En Banc was denied on

March 3, 1998. (Appendix A-26.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES AND REGULATIONS INVOLVED

Section 3(2) of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (1994), provides:

(2) Disability. The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Section 1630.2(j) of the Americans with Disabilities Act of 1990 Regulations, 29 C.F.R. § 1630.2(j) (1997), provides in pertinent part:

(j) Substantially limits—

(3) With respect to the major life activity of working—

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the majo[r] life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs

utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

EEOC Interpretive Guidance for § 1630.2(j), 29 C.F.R. § 1630, App. § 1630.2(h) & (j)(2) (1997), provides in pertinent part:

(h) ...The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid....

(j)(2) ...The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices....

STATEMENT OF THE CASE

Petitioners are twin sisters who are extremely well qualified and credentialed to be airline pilots. They currently are commercial pilots for commuter airlines, however it is their lifelong goal to fly for a major global air carrier.

As alleged in their Amended Complaint, the Pilots' vision is poorer than the standard for legal blindness for many purposes.

Specifically, both of the Pilots have uncorrected vision of 20/200 or worse in the right eye, and 20/400 or worse in the left eye. Without the use of corrective measures, Petitioners cannot conduct such basic activities as driving an automobile or watching television. When wearing glasses or contact lenses, however, the Pilots' corrected vision is 20/20, and the FAA has awarded both a first class medical certificate.

Petitioners applied to United for employment as pilots. United invited the Pilots to interview at its Denver Flight Training Center, and administered a flight simulator test to Petitioner Hinton, on which she performed well. Nevertheless, United rejected Petitioners from any consideration as pilots due to their vision. United requires applicants to have uncorrected vision of 20/100 or better in order to be considered for any of its thousands of pilot positions around the world, regardless of model of aircraft, air route, or flight conditions.[1] United asserts that this is a rational safety requirement, but Pilots have alleged that the requirement reflects only stereotype, myth, or unsubstantiated fears, and bears no relationship to safety. Indeed, Petitioners believe that United does not apply its vision requirement to current pilots in its own fleet.

The Pilots brought suit against United under Section 3(2) of the Americans With Disabilities Act ("Act"), 42 U.S.C. § 12102(2) (1994). They alleged that United violated the Act by rejecting them because they were disabled, or because United regarded them as disabled. Plaintiffs sought legal and equitable relief provided for in the Act, including injunctive relief ordering United not to apply unlawful criteria in future hiring decisions.

The district court granted United's motion to dismiss the Pilots' action. United did not dispute that the Pilots were disqualified from its pilot positions because of their impaired vision. Nevertheless, the district court held that the Pilots' vision is not a

[1] Other global air carriers have similar vision requirements, although Petitioners have been able to fly commercially for commuter airlines.

substantially limiting impairment within the meaning of the ADA. The court of appeals affirmed. The court of appeals concluded that the Pilots are physically impaired within the meaning of the ADA, but are not substantially impaired in the major life activity of seeing when the corrective measures of glasses or contact lenses are considered. The court expressly acknowledged that its holding was directly contrary to interpretive guidelines of the Equal Employment Opportunity Commission ("EEOC") and to decisions of the Eighth, Ninth, and Eleventh Circuits. (Appendix A-14 to A-16 & n.7.)

ARGUMENT FOR GRANTING THE WRIT

The decision below clouds an important area of the law, exacerbating the conflict among the circuits as to whether corrective measures should be considered in analyzing disabilities under the ADA. The lower court's holding that corrective measures should be taken into account expressly conflicts with the rule of the majority of circuit courts to have considered the issue. It also rejects the guidance of the EEOC on this issue, thus worsening the existing confusion as to the proper deference to be afforded the EEOC's guidance.

Alternatively, the court below confused the state of the law by ruling that Pilots did not adequately allege that United regarded them as disabled. The court reasoned that the Pilots were not barred from all pilot positions at all airlines, which conflicts with the prevailing rule that, in applying the "regarded as" standard, courts must focus upon the attitudes of the defendant employer and not others in the industry.

I. THE TENTH CIRCUIT'S HOLDING THAT ANALYSIS OF DISABILITIES SHOULD INCLUDE AVAILABLE CORRECTIVE MEASURES THROWS INTO TURMOIL THIS IMPORTANT AREA OF THE LAW.

A. The Tenth Circuit's Decision Greatly Exacerbates the Conflict Among the Circuits Regarding Corrective Measures under the ADA.

The Tenth Circuit agreed with Petitioners that their uncorrected vision constituted a disability within the meaning of the ADA. It held, however, that this impairment does not "substantially limit[ ] one or more . . . major life activities" because it can be corrected with glasses or contact lenses. 42 U.S.C. § 12102(2)(A). The Tenth Circuit recognized that the circuits have split on the issue of whether disability inquiries under the ADA should be made without regard to such mitigating or corrective measures. (Appendix A-14, A-15 nn.7 & 8.) It also recognized that its holding is contrary to the EEOC's view that corrective measures should not be considered. (Appendix A-16.) By joining those courts rejecting the EEOC's view, the Tenth Circuit has significantly deepened the conflict among the circuits in this important area of the law.

The Tenth Circuit correctly observed that by the time of its decision, several published district court opinions divided widely on this issue.[2] For a short period, however, there was apparent unanimity among the courts of appeals. The Seventh, Eighth,

[2] *Compare Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997) (holding under Rehabilitation Act against consideration of mitigating measures of contact lenses); *Wilson v. Pennsylvania State Police Dep't*, 964 F. Supp. 898, 902-07 (E.D. Pa. 1997) (same holding under ADA); *Piquard v. City of East Peoria*, 887 F. Supp. 1106, 1129 (C.D. Ill. 1995) (same); *Sarsycki v. United Parcel Serv.*, 862 F. Supp. 336, 340 (W.D. Okla. 1994) (following EEOC interpretation) *with Cline v. Fort Howard Corp.*, 963 F. Supp. 1075, 1081 n.6 (E.D. Okla. 1997) (asserting that courts should evaluate vision impairment with regard to corrective devices); *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997) (rejecting EEOC interpretation); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996) (same); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 813 (N.D. Texas 1994) (same).

Ninth, and Eleventh Circuits had all agreed that disabilities must be analyzed without regard to medications, prostheses or other possible corrective measures.[3] *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. June 16, 1997) (holding, specifically in the context of impaired vision, that "analysis of whether [plaintiff] is disabled does not include consideration of mitigating measures"), *cert. denied*, 118 S. Ct. 693 (1998); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995) (same holding); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996) (holding that disabilities must be assessed without regard to mitigating measures); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996) (same), *cert. denied*, 117 S. Ct. 1349 (1997). At the circuit court level, only *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-92 n.3 (5th Cir. 1996), contained language arguably to the contrary.[4]

On September 2, 1997, however, the Sixth Circuit held that disability determinations should be made in light of the effect of medications or other corrective measures. *Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir. 1997) (as modified on October 30, 1997) (discussion contained in concurrence of two of three circuit judges). The Sixth Circuit so interpreted the language of the ADA notwithstanding the EEOC's contrary position, supported by legislative history of the ADA. *Id.* at 767.

The Tenth Circuit's decision, also squarely rejecting the EEOC's view against consideration of corrective measures, removes any doubt as to the extent of division among the lower

[3] More recently, the First and Third Circuits have reached the same conclusion. *Arnold v. United Parcel Serv.*, 136 F.3d 854 (1st Cir. 1998); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997).

[4] The Fifth Circuit implied, but did not squarely hold, that it would take into account corrective measures, noting that "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity." *Id.*; *but see Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800,805 (5th Cir. 1997) (quoting EEOC guideline against consideration of mitigating measures without discussion), *cert. denied*, 118 S. Ct. 1050 (1998).

courts. This conflict is now ripe for determination by this Court. No purpose can be served by tolerating two widely divergent interpretations of the ADA in the various courts that have considered this question, or abandoning litigants in those jurisdictions which have not yet reached this issue to complete uncertainty as to how this important federal legislation will be interpreted.

As the many decisions cited above amply illustrate, this conflict impacts a very wide range of disabilities that may be affected by various types of corrective measures. Examples of the types of corrective measures for disabilities at issue in these cases include medication for illnesses, *e.g.*, *Harris*, *supra* (Graves' disease could potentially be treated); *Arnold*, *supra* (diabetes potentially could be ameliorated through medication); *Matczak*, *supra* (same), therapy for physical or psychological disorders, *e.g.*, *Holihan*, *supra* (activities undertaken as treatment for depression); *Ellison*, *supra* (breast cancer treated with radiation therapy), and hearing aids or other devices. *E.g.*, *Gaddy*, *supra* (asthma treated with inhaler and breathing machine). The Tenth Circuit has already extended its reasoning in the instant case to hold that high blood pressure must be analyzed accounting for potentially available treatment with medication. *Murphy v. United Parcel Serv.*, 1998 WL 105933 (10th Cir. March 11, 1998).

The view of the Sixth and Tenth, and possibly Fifth, Circuits would thus carve out entire categories of disabled persons who would otherwise enjoy the protections of the ADA, despite legislative history to the contrary.[5] The Tenth Circuit's restriction on the effect of the ADA significantly undercuts the goal of the Act

[5] The relevant legislative history supports the view that the ADA is applicable without regard to corrective measures. *See* S.Rep. No. 101-116, at 23 (1990); H.R. Rep. No. 101-485(II), at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid."); H.R. Rep. No. 101-485(III), at 28, *reprinted in* 1990 U.S.C.C.A.N. 445, 451 ("House Judiciary Report").

"to protect individuals who have an underlying medical condition or other limiting impairment, but who are in fact capable of doing the job, with or without the help of medications, prosthetic devices, or other ameliorative measures." *Arnold*, 136 F.3d at 861. Such a dramatic limitation on the reach of this important statute warrants this Court's attention.

B. The Tenth Circuit's Decision Is at Odds with the EEOC's Interpretation and Worsens Confusion as to Deference to Be Afforded the Agency's Guidance.

The decision below is significant not only for the result it reaches, but also for the lower court's cavalier attitude toward the EEOC's interpretation of the controlling provisions of the ADA. By showing no deference to the agency's guidance, the lower court further disrupts the already murky rule of law as to the appropriate deference to afford.

As evidenced by the split among the circuits, there is more than one possible interpretation of the ADA's definition of "disability." 42 U.S.C. § 12102(2)(A). In conjunction with its regulations to carry out the directives of the ADA, *see* 42 U.S.C. § 12116 (1994) (requiring EEOC to issue regulations), the EEOC issued its Interpretive Guidance, which construes the provision in question to mean that both the existence of an impairment, and the determination of whether that impairment substantially limits a major life activity, must be made on a case by case basis, "without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630, App. § 1630.2(h) & (j)(2) (1997). Typically, courts would be obligated to adhere to the agency's construction of the statute, so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

This Court has instructed, however, that an agency's interpretive guidelines, as opposed to regulations promulgated under the Administrative Procedure Act, 5 U.S.C. § 552 (1994), are not

necessarily binding upon courts, but rather "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)).

Even before this case arose, courts exhibited confusion in attempting to apply *Chevron* and *Meritor* to determine the proper level of deference to be afforded EEOC interpretive pronouncements regarding the ADA. In *Harris v. H&W Contracting, supra*, the Eleventh Circuit applied *Chevron*, and concluded that it could not disregard the EEOC's Guidance. 102 F.3d at 521. The court in *Wilson v. Pennsylvania State Police Dep't,* 964 F.Supp. 898, 903-05 (E.D. Pa. 1997), gave *Chevron* deference to the EEOC's guideline on corrective measures, specifically in the context of impaired vision. The court noted that the EEOC Guidance was subject to public notice and comment, and carried more weight than typical interpretive rules. *Id.* at 903 n.4.

The Third Circuit in *Matczak* stated that the EEOC Guidance does not command the same deference as the underlying regulations, but still concluded that courts must give the EEOC's guidelines controlling weight unless plainly erroneous. 136 F.3d at 937 (citing *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994)); *see also Sicard v. City of Sioux City,* 950 F.Supp. 1420 (N.D. Iowa 1996) (applying deference in context of impaired vision). Other courts interpreting the same language have apparently not given the EEOC Guidance controlling weight, but some lower yet significant level of deference. *E.g., Arnold*, 136 F.3d at 866; *cf. Olson v. Dubuque Community School Dist.*, 137 F.3d 609, 612 (8th Cir. 1998) (EEOC enforcement guidance entitled to deference).

Each of these courts was careful to give some level of deference to the EEOC Guidance, although they are inconsistent as to exactly how much deference to give. In contrast, here the Tenth Circuit expressly did not defer to the expertise of the EEOC, stating only that the "Guidance may be entitled to some consideration in our analysis." (Appendix A-9 n.3.) The lower

court's approach is at odds with *Meritor* and is markedly different from this Court's pattern of showing deference even to informal agency pronouncements. *See Auer v. Robbins,* 519 U.S. 452, 117 S. Ct. 905, 911-12 (1997) (giving deference to position of Secretary of Labor stated in a legal brief); *Martin v. Occupational Safety and Health Review Com'n*, 499 U.S. 144, 157 (1991) (informal interpretive rules are entitled to some weight on judicial review).

The EEOC's Guidance and other publications encompass a range of issues under the ADA well beyond the question of corrective measures addressed by the court below. This Court's clarification of the deference due the EEOC's interpretation of the ADA is of tremendous importance. At present, particularly in light of the Tenth Circuit's opinion, employers and employees cannot predict with accuracy whether EEOC guidelines will be respected in a court of law.

II. THE TENTH CIRCUIT'S HOLDING THAT PETITIONERS ARE NOT REGARDED AS DISABLED CONFLICTS WITH THE RULE THAT THE DEFENDANT'S PERCEPTION NEED NOT BE COMMON TO THE INDUSTRY.

An independent basis for Petitioners' action is the allegation that they were regarded as having an impairment by United with respect to a class of jobs. 42 U.S.C. § 12102(2)(C) (1994). The court below rejected this claim because "the 'class of jobs' to which Plaintiffs must compare themselves is that of all pilot positions at all airlines." (Appendix A-22.) This holding is directly at odds with the prevailing rule that it is the individual employer's perception at issue under the "regarded as" standard, again generating unacceptable confusion and undermining the purpose of the statute.

The Seventh Circuit recently summarized the majority rule that, unlike the actually disabled prong of the ADA, the

"regarded as" disabled standard centers upon the specific employer's perceptions:

> Section 12102(2)(A) looks for proof beyond the plaintiff's inability to satisfy the expectations of a single employer; to be "substantial," a limitation on the ability to work must be one that affects the plaintiff's ability to perform a class or range of jobs before it qualifies as a disabling limitation under the ADA. For purposes of § 12102(2)(C), *the employer's perception* of the plaintiff's inability to work must have a comparable breadth. A perception that [her disability] rendered [plaintiff] unfit to work as a psychotherapist, for example, might bring her within the scope of 12102(2)(C).

Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, (7th Cir. 1998) (emphasis added) (footnote and multiple citations omitted). Under this rule, United falls within the scope of the "regarded as" test if it perceives Petitioners as unfit to work as pilots.

In its opinion, the Tenth Circuit gave lip service to the premise that "[i]t is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters." (Appendix A-22) (citing *Cook v. Rhode Island Dep't of Mental Health, Retardation & Hosps.*, 10 F.3d 17, 25-26 (1st Cir. 1993) ("regarded as" prong "does not condition . . . claims on either the quantum of a plaintiff's application efforts or on her prospects of finding other employment")). This is only logical; the perceptions of other airlines would be relevant to a determination of whether Pilots actually are substantially impaired in the life activity of working, but not to the issue of whether *United* so perceives them. *See* House Judiciary Report, at 30, 1990 U.S.C.C.A.N. at 453 (person perceived by employer as disabled is "regarded as" disabled whether or not employer's perception is shared by others in the field).

Yet the court below quickly abandoned this basic rule by focusing upon the availability to Pilots of jobs with other employers in the industry. The Court disregarded the simple fact that

United will not hire Pilots because it regards them as disabled.[6] It instead considered whether other employers may hire them, which depends of course upon whether those employers also regard Pilots as disabled. Even though other global air carriers follow the same vision standard as United, the court seized upon the fact that Petitioners found work with a commuter airline to preclude their claim. Thus, the Tenth Circuit's approach imposes through the back door the requirement that Pilots must be regarded as disabled by *all* employers, not just United.

By implicitly revising the "regarded as" standard, the court below has once more broken with existing authority. Moreover, its holding effectively renders the "regarded as" prong meaningless. Under its decision, an employer cannot be liable unless all other employers also prohibit the plaintiff from working, in which case the employee's claim might as easily be stated under the actually disabled standard. Meanwhile, an individual employer may with impunity unilaterally discriminate against employees it incorrectly perceives to be disabled. In light of the mischief the Tenth Circuit's holding would do to this provision of the ADA, this Court's attention is required to resolve the issue.

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[6] United will not hire Pilots for *any* of their pilot positions. This is not a preclusion that applies only to a particular, isolated position. *Compare Byrne v. Bd. of Education*, 979 F.2d 560, 566 (7th Cir. 1992) (asthma prevented teacher from teaching at two specific schools, but not at other schools within the same district); *Forrisi v. Bowen*, 794 F.2d 931 (4th Cir. 1986) (acrophobic employee precluded from performing repairman position at a particular facility requiring him to climb multiple stairs and ladders). United's vision standard affects a class of jobs in that it is not limited to particular pilot positions, just as the Seventh Circuit has recently held in the analogous context of truck drivers hampered by disabilities. *See Best v. Shell Oil Co.*, 107 F.3d 544, 548 (7th Cir. 1997) (finding genuine issue of fact as to whether employer regarded driver with injured knee as disabled where it disallowed him from performing any truck driving positions); *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147 (7th Cir. 1998) (sleep disorder that precluded driver from sleeper trucks but not from other driving positions offered by employer did not affect a class of jobs).

CONCLUSION

The decision below creates or exacerbates conflicts among the circuits in important areas of federal employment law, and threatens to undermine the purposes of the ADA and to render meaningless the EEOC's guidance. A writ of certiorari should issue to review the Tenth Circuit's decision.

Respectfully submitted this
1st day of June, 1998.

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Defendant-Appellee.

No. 96-1481.
United States Court of Appeals,
Tenth Circuit.
Nov. 26, 1997.

Lisa Hogan (Patrick F. Carrigan and Beth A. Doherty Quinn with her on the brief) of Brownstein, Hyatt, Farber & Strickland, Denver, CO, for appellee. Shawn D. Mitchell of Ireland, Stapleton, Pryor & Pascoe, Denver, CO, for appellants.

Before BRORBY, BARRETT, and McKAY Circuit Judges.

BARRETT, Senior Circuit Judge.

Karen Sutton and Kimberly Hinton (collectively referred to as Plaintiffs) appeal the district court's dismissal of their Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq., discrimination claims for failure to state a claim upon which relief may be granted. See *Sutton v. United Airlines, Inc.*, No. 96-S-121, 1996 WL 588917 (D.Colo. Aug. 28, 1996). For the following reasons, we affirm.

Background

Plaintiffs, who are twin sisters, are currently commercial airline pilots for regional commuter airlines. However, they share a "life long goal to fly for a major air carrier." In 1992, Plaintiffs applied for commercial airline pilot positions with United Air Lines, Inc. (United) and were invited to interview in Denver, Colorado. At their interviews, Plaintiffs were informed

that their uncorrected vision disqualified them from pilot positions with United, in that applicants for pilot positions must have uncorrected vision of 20/100 or better in each eye. Plaintiffs' uncorrected vision is 20/200 in the right eye and 20/400 in the left eye. [FN1] Plaintiffs' corrected vision is 20/20 in both eyes.

FN1. A person with visual acuity of 20/200 can see an object from 20 feet only as well as a person with 20/20 vision can see an object at 200 feet.

Plaintiffs Amended Complaint, filed pursuant to the ADA, alleged that United discriminated against them in the hiring process by rejecting their applications because of their "disability," their uncorrected vision, and/or because United regarded them as disabled. Plaintiffs asserted they are disabled under the ADA because their uncorrected vision substantially limits their major life activity of seeing. They averred their vision limitations are permanent and that without corrective measures, they would "effectively be unable to see" well enough to conduct normal everyday activities such as driving, watching television, or shopping. In addition, Plaintiffs alleged United regarded them as disabled in violation of the ADA because United's policy of requiring uncorrected vision of 20/100 or better blocks Plaintiffs from an entire class of employment, global airline pilots, without any objective evidence of job relatedness or safety.

On August 28, 1996, the district court granted United's motion to dismiss. The court concluded that Plaintiffs' Amended Complaint failed to state a claim under the ADA. The district court ruled that Plaintiffs were not disabled within the meaning of the ADA because their vision did not substantially limit a major life activity. The court stated that with corrective measures Plaintiffs' were "able to function identically to individuals without a similar impairment" and as such Plaintiffs were not substantially limited in the major life activity of seeing. *Sutton*, 1996 WL 588917, at *3. The court reasoned that "[t]o adopt a definition of 'disabled' that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the

ADA. Millions of Americans suffer visual impairments no less serious that those of the Plaintiffs. Under such an expansive reading, the term 'disabled' would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect." *Id.* at *5. With respect to Plaintiffs' claim that United regarded them as disabled in violation of the ADA, the district court found no support for Plaintiffs' allegation that United regarded them as substantially impaired in the major life activity of seeing based on stereotype, myth, or unsubstantiated fears. › Id. At best, the court reasoned that Plaintiffs established that United regarded them as "unable to satisfy the requirements of a particular passenger airline pilot position." *Id.* at *6.

On appeal, Plaintiffs contend the district court erred in dismissing their Amended Complaint for failure to state a claim under the ADA. Plaintiffs assert that they alleged sufficient facts to establish that: (1) they were qualified applicants with a disability because they are substantially limited in the major life activity of seeing, and (2) United regarded them as having a substantially limiting impairment because its policy deprives them of employment throughout the global air carrier industry with no rational job-related basis. Plaintiffs argue that the district court erred in evaluating their physical impairment, their vision, with the benefit of corrective measures, in direct contradiction to the Equal Employment Opportunity Commission's (EEOC) Interpretive Guidance, which provides that the determination of whether an individual has a physical impairment and whether an individual is disabled within the meaning of the ADA must be done without regard to mitigating or corrective measures.

United responds that Plaintiffs' vision does not constitute a "physical or mental impairment" within the meaning of the ADA and that, even if it does, it does not "substantially limit" a major life activity. First, United contends that a minor, relatively common condition, such as Plaintiffs' nearsightedness and subsequent need for glasses, is not an impairment under the ADA. Second, United asserts that even if Plaintiffs are impaired within

the meaning of the ADA, the EEOC's Interpretive Guidance, stating that disability determinations be made without regard to mitigating or corrective measures, is in direct conflict with the ADA's statutory requirement that a disability be a physical or mental impairment that "substantially limit[s] one or more of the major life activities of such individual." See 42 U.S.C. S 12101(2). United argues that to evaluate a disability without regard to mitigating measures would read out the ADA's statutory requirement that the impairment be "substantially" limiting. United reasons that if an individual can utilize corrective measures to mitigate the effects of an impairment to a degree such that there is no substantial limitation on a major life activity, then the individual is not disabled within the meaning of the ADA. Finally, United asserts that Plaintiffs can offer no substantive evidence it regarded them as anything other than as unable to meet the rational job-related safety requirements of the jobs they sought.

We review the district court's dismissal of a complaint for failure to state a claim upon which relief may be granted de novo. *Chemical Weapons Working Group, Inc. v. United States Dep't of the Army*, 111 F.3d 1485, 1490 (10th Cir.1997). "'We uphold a dismissal under Fed.R.Civ.P. 12(b)(6) only when it appears that the plaintiff[s] can prove no set of facts in support of the claims that would entitle [them] to relief, accepting all well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff[s].'" *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir.) (quoting *Fuller v. Norton*, 86 F.3d 1016, 1020 (10th Cir.1996)), *cert. denied*, — U.S. —, 118 S.Ct. 55, — L.Ed.2d — (1997). With this standard in mind, we turn to Plaintiffs' ADA claims.

Discussion

The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training,

and other terms, conditions, and privileges of employment." [FN2] 42 U.S.C. S 12112(a). See *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942 (10th Cir.1994) (quoting 42 U.S.C. S 12112(a)), *cert. denied*, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. S 12111(8). *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir.1995) (quoting 42 U.S.C. S 12111(8)).

FN2. In this analysis, we rely on cases interpreting both the ADA and the Rehabilitation Act of 1973, 29 U.S.C. S 701 et seq., because the standards are largely the same. *See Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir.1997) (concluding "cases construing one statute are instructive in construing the other"); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 n. 2 (8th Cir.1995) ("cases interpreting either [ADA or Rehabilitation Act] will be instructive for this analysis" of the ADA); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir.1994) ("'Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA.'") (quoting 29 C.F.R. § 1630, App. 1630.2(g)), *cert. denied*, 513 U.S. 1152, 115 S.Ct. 1104, 130 L.Ed.2d 1071 (1995).

To establish a claim under the ADA, Plaintiffs must demonstrate that: (1) they are disabled persons within the meaning of the ADA; (2) they are qualified, i.e., able to perform the essential functions of the job, with or without reasonable accommodation (which they must describe); and (3) United discriminated against them in its employment decision (the job application procedure and/or hiring process) because of their alleged disability. See Siemon v. AT&T Corp., 117 F.3d 1173, 1175 (10th Cir.1997); White, 45 F.3d at 360-61.

Taking all Plaintiffs' allegations in their Amended Complaint as true, as we must, Plaintiffs have established they are "qualified" for the position of commercial airline pilot and that United refused to continue their interviews (or hire them) due to

their alleged disability, their uncorrected vision. Plaintiffs are both commercial airline pilots with regional commuter airlines; each holds an airline transport pilot license, which supersedes United's requirement for a commercial license; each has recorded thousands of hours of flight time as Pilot in Command; and each has a First-Class medical certificate from the Federal Aviation Administration (FAA). Additionally, United sent each plaintiff a letter confirming that her uncorrected vision, each plaintiff's alleged disability, disqualified her from employment as a United pilot. Thus, at issue in this case, is whether Plaintiffs' vision qualifies them as "individuals with a disability" within the meaning of the ADA.

The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The statutory requirement that disability determinations be made "with respect to the individual," contemplates an individualized, and case-by-case determination of whether a given impairment substantially limits a major life activity of the individual. *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 166 (4th Cir.1997) (en banc) (citing *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 59-60 (4th Cir.1995) (collecting cases holding that a finding of disability must be made on a case-by-case basis)). *See also Homeyer v. Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir.1996) (holding that "a determination of disability must be made on an individualized, case-by-case basis"); *Katz v. City Metal Co., Inc.*, 87 F.3d 26, 32 (1st Cir.1996) (same); *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir.1996) (applying factors in an individualized manner).

Here, Plaintiffs allege they are "disabled" within the meaning of the subparagraphs (A) and (C) because their uncorrected vision is a physical impairment that substantially limits their major life activity of seeing and United regarded them as having a substantially limiting impairment when it disqualified them

from all airline pilot positions. We address each of Plaintiffs' contentions in turn.

I. 42 U.S.C. S 12102(2)(A)—Actual Disability

Subparagraph (A) defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual. › 42 U.S.C. S 12102(2)(A). Therefore, to qualify as having a "disability" pursuant to subparagraph (A), Plaintiffs must establish (1) that their vision is a "physical or mental impairment;" and (2) if their vision is an impairment, that it "substantially limits one or more of the[ir] major life activities." See *id.*

1. Physical or Mental Impairment

Plaintiffs must establish that their vision is a "physical or mental impairment." See id. The ADA does not define a "physical or mental impairment." Hence, we are confronted with a question of statutory interpretation. Our inquiry begins with an examination of the language of the statute itself. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1460 (10th Cir.1997). "'When the terms of the statute are clear and unambiguous, that language is controlling absent rare and exceptional circumstances.'" *Id.*(quoting *United States v. Thompson*, 941 F.2d 1074, 1077 (10th Cir.1991), *cert. denied*, 503 U.S. 984, 112 S.Ct. 1667, 118 L.Ed.2d 388 (1992) (quotation omitted)). In addition, "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 2054, 124 L.Ed.2d 138 (1993). "[C]ommon and ordinary usage may be obtained by reference to a dictionary." *United States v. Roberts*, 88 F.3d 872, 877 (10th Cir.1996).

The term "impairment" is not defined by the statute. However, the statute does require that the impairment "substantially limit" a major life activity. See 42 U.S.C. § 12102(2)(A). Thus, the impairment must be significant, and not merely trivial. *Welsh v. City of Tulsa, Okl.*, 977 F.2d 1415, 1417 (10th Cir.1992). *See also*

Runnebaum, 123 F.3d at 167 ("Because the impairment must impose a 'substantial limitation' on 'one or more of the major life activities,' the impairment must be significant, not merely trivial."); *Byrne v. Board of Educ., Sch. of West Allis-West Milwaukeep*, 979 F.2d 560, 564 (7th Cir.1992) ("The statute's inclusion of the limiting adjectives 'substantial' and 'major' emphasizes that the impairment must be a significant one."); *Forrisi v. Bowen*, 794 F.2d 931, 933-34 (4th Cir.1986) (concluding that "[t]he statutory language, requiring a substantial limitation of a major life activity, emphasizes that the impairment must be a significant one"). In addition, Webster's Dictionary defines "impair" as "to make worse by or as if by diminishing in some material respect." Webster's Ninth New Collegiate Dictionary 574 (1984). See also Black's Law Dictionary 677 (5th ed. 1981) ("To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner."); Ballentine's Law Dictionary 584 (3d ed. 1969) ("To make worse; to diminish in quality, value, excellence, or strength; to deteriorate.").

We are also guided by the definition promulgated by the EEOC in its regulations issued to implement Title 1 of the ADA. See 29 C.F.R. § 1630.1(a); 42 U.S.C. § 12116 (requiring the EEOC to issue regulations to implement Title 1 of the ADA). The regulations define a "physical or mental impairment" as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, *899 digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h).

To further assist in the interpretation of the ADA, the EEOC published an Interpretive Guidance on Title I of the Americans with Disabilities Act. 29 C.F.R. § 1630, App. Under

the EEOC's Interpretative Guidance, "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices." [FN3] 29 C.F.R. § 1630, App. § 1630.2(h) para. 2.

FN3. It is well established that we must defer to the EEOC's regulatory definition unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). However, although we give great deference to the EEOC's interpretation of the ADA found in the regulations promulgated under the express authority of Congress and the ADA itself, we do not do the same for interpretative guidance promulgated under the Administrative Procedure Act. See *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1282 (10th Cir.1994) (no special deference due to Department of Labor comment, which is a "purely interpretive rule") (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 301- 04, 99 S.Ct. 1705, 1717-19, 60 L.Ed.2d 208 (1979) (explaining distinction between interpretative rules and substantive or legislative rules)). Hence, while the EEOC's Interpretive Guidance may be entitled to some consideration in our analysis, it does not carry the force of law and is not entitled to any special deference under *Chevron*.

Accordingly, we must determine whether Plaintiffs' vision makes worse or diminishes in a material or significant respect any of the enumerated body systems. See 29 C.F.R. § 1630.2(h). We will evaluate Plaintiffs' vision in the uncorrected state, without the benefit of mitigating or corrective measures, because the EEOC's Interpretive Guidance is reasonable and consistent with the statutory mandates themselves. The fact that a disorder or condition may be mitigated or correctable does not affect the underlying nature of the disorder or condition. If the underlying disorder or condition makes worse or diminishes in a material respect any of the enumerated body systems of the individual, then it should be considered an "impairment," regardless of whether the individual compensates for this worsening or diminishment by corrective measures. *See Roth v. Lutheran Gen. Hosp.*,

57 F.3d 1446, 1454 (7th Cir.1995) (concluding impairment determination made without regard to mitigating measures).

In addition, "[i]t is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments." 29 C.F.R. § 1630, App. S 1630.2(h) para. 3. Hence, impairment does not include: physical characteristics such as eye color, hair color, left-handedness, height, weight, or muscle tone that are within the "normal" range and are not the result of a physiological disorder; characteristic predisposition to illness or disease; pregnancy; common personality traits such as poor judgment or quick temper where these are not the symptoms of a mental or psychological disorder; or environmental, cultural or economic disadvantages such as poverty, lack of education or a prison record. *Id. See Andrews v. Ohio*, 104 F.3d 803, 810 (6th Cir.1997) (holding physical characteristics of excessive weight and lack of cardio-respiratory endurance and strength not impairments under the ADA); *Daley v. Koch*, 892 F.2d 212, 215 (2nd Cir.1989) (holding in Rehabilitation Act case that personality traits of "poor judgment, irresponsible behavior and poor impulse control" could be described as commonplace and "in no way r[ose] to the level of an impairment"); *Tudyman v. United Airlines*, 608 F.Supp. 739, 746 (C.D.Cal.1984) (finding body builder's "unique musculoskelital [sic] system and body composition" not an impairment because it is not the result of a "physiological disorder [ ]," "cosmetic disfigurement," or "anatomical loss"); *Trembczsynski v. City of Calumet City*, No. 87-C-0961, 1987 WL 16604 (N.D.Ill. Aug.31, 1987) ("Being slightly myopic [20/40 uncorrected vision] is a physical characteristic, not . . . an 'impairment' as contemplated by the [Rehabilitation] Act."). Compare *Cook v. Rhode Island, Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 23 (1st Cir.1993) (concluding "morbid obesity" may be physical impairment).

Plaintiffs averred that their uncorrected vision prevents them from engaging in normal everyday activities, such as, driving, watching television, and shopping. After careful consideration, we hold that Plaintiffs' averments are sufficient to establish that their uncorrected vision of 20/200, in the right eye, and 20/400, in the left eye, makes worse or diminishes the eyes, the special sense organ of sight, compared to a normal person with 20/20 vision. [FN4] Therefore, for the purposes of the motion to dismiss, Plaintiffs established their vision is a physical impairment within the meaning of the ADA.

FN4. It could be argued that by definition uncorrected vision of 20/200 and 20/400 makes worse or diminishes in a material respect the eyes on any individual creating a per se impairment. However, we do not espouse or endorse any per se impairments or disabilities. As noted supra, the ADA's use of individualized language requires courts to make case-by-case impairment and disability determinations. *See Runnebaum*, 123 F.3d at 169 (determination of whether individual with asymptomatic HIV is impaired or disabled must be made on individualized case-by-case basis).

2. "Substantially Limits" A "Major Life Activity"

Plaintiffs must also establish that their physical impairment, their vision, "substantially limits one or more of the[ir] major life activities." See 42 U.S.C. § 12102(2)(A). The ADA does not define either "substantially limits" or "major life activity." Therefore, we are again confronted with questions of statutory interpretation. We begin our analysis with the term "major life activity." While the statute itself does not define a "major life activity," the ADA regulations adopt the definition found in the Rehabilitation Act regulations, 34 C.F.R. § 104. *Bolton*, 36 F.3d at 942. As defined, a "major life activity" includes, but is not limited to, "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). See *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1444 (10th Cir.1996) (adopting regulation's definition of "major life activities") (quoting 29 C.F.R. § 1630.2(i)); *Lowe*, 87 F.3d at 1173 (including sitting, standing, lifting and reaching from 29 C.F.R. § 1630, App. § 1630.2(i)).

In their Amended Complaint, Plaintiffs alleged they are substantially limited in the major life activity of seeing. Inasmuch as seeing is expressly included in the EEOC's definition of major life activities, which has been previously adopted by this court, we do not decide what other activities may qualify and we now turn to consider whether Plaintiffs' physical impairment "substantially limits" their major life activity of seeing.

Pursuant to the ADA regulations, in order for a physical or mental impairment to be "substantially limiting," the individual must be:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or

duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

In determining whether an individual is substantially limited in a major life activity, the following three factors should be considered: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent long term impact, or the expected permanent or long term impact of or resulting from the impairment. 29 C.F.R. S 1630.2(j)(2). See *MacDonald*, 94 F.3d at 1444 (quoting 29 C.F.R. S 1630.2(j)(2)); *Lowe*, 87 F.3d at 1173 (same); *Bolton*, 36 F.3d at 943 (same).

Thus, in order to establish that they are substantially limited in the major life activity of seeing, Plaintiffs must establish that they are unable to see or are significantly restricted as to the condition, manner, or duration of their ability to see as compared to the average person in the general population, taking into consideration the three listed factors. See 29 C.F.R. § 1630.2(j)(1)(i) and (ii). Plaintiffs have made no allegations that they are blind or unable to see. [FN5] Hence, we are concerned with Plaintiffs' vision as compared to the vision of the average person in the general population.

FN5. Plaintiffs point out in their Amended Complaint that "corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification." However, this standard applies to corrected vision not uncorrected vision. Plaintiffs' corrected visual acuity is acknowledged to be "20/20 or better." Hence, any implication that they are "legally blind" is without merit.

There is no dispute that Plaintiffs' vision impairment is permanent and results in the reliance on corrective measures, eye glasses or contact lenses, in order to carry out normal daily activities. [FN6] However, Plaintiffs argue that we must evaluate their vision impairment without respect to these mitigating measures. Plaintiffs rely on the EEOC's Interpretive Guidance

for § 1630.2(j), which provides that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. § 1630, App. § 1630.2(j)(2) para. 8. Accordingly, Plaintiffs argue that they are disabled because their uncorrected vision substantially limits their major life activity of seeing.

FN6. On appeal, we do not consider the effects, if any, that eye surgery, such as radial keratotomy, may have on the permanency or long term impact of Plaintiffs' vision. However, we are mindful that as technology advances so must our consideration of these questions.

United responds that the EEOC's Interpretive Guidance is in direct conflict with the statutory language requiring that the physical or mental impairment "substantially limit" a major life activity. United argues that to evaluate whether an individual has an impairment without regard to mitigating or corrective measures effectively reads out the statutory requirement that the impairment be "substantially" limiting. United reasons that the determination of whether Plaintiffs are "disabled" must be made taking into consideration any mitigating or corrective measures utilized by Plaintiffs.

Therefore, the crucial determination becomes whether the EEOC's Interpretive Guidance is correct that disability inquiries should be made without regard to mitigating or corrective measures or is in conflict with the statutory mandate that the impairment "substantially limit" a major life activity. The courts that have considered this issue are split. While some courts have expressly or implicitly followed the EEOC's guidance, [FN7] others have expressly or implicitly rejected the EEOC's guidance as being in direct conflict with the statutory language requiring a "substantial" limitation. [FN8]

FN7. *See Doane v. City of Omaha,* 115 F.3d 624, 627 (8th Cir.1997) (stating "analysis of whether [plaintiff] is disabled does

not include consideration of mitigating measures"); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir.1996) (holding EEOC's interpretation is consistent with the ADA's legislative history, thus, an individual's disability must be assessed without regard to mitigating measures); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir.1996) (stating determination made without regard to mitigating measures without discussion or application), *cert. denied*, — U.S. —, 117 S.Ct. 1349, 137 L.Ed.2d 506 (1997); *Fallacaro v. Richardson*, 965 F.Supp. 87, 93 (D.D.C.1997) ("This Court finds that the EEOC's no mitigating measures' interpretation is eminently reasonable, consistent with the language and purpose of the Rehabilitation Act, and supported by the legislative history of the ADA."); *Wilson v. Pennsylvania State Police Dep't,* 964 F.Supp. 898, 902-907 (E.D.Pa.1997) (expressly adopting EEOC guidance); *Sarsycki v. United Parcel Serv.*, 862 F.Supp. 336, 340 (W.D.Okla.1994) (relying on EEOC interpretation as authoritative without discussion).

FN8. *See Gilday v. Mecosta County,* 124 F.3d 760, 767-68 (6th Cir.1997) (holding EEOC's interpretive guidance in conflict with statutory language and disability determinations should be made taking into consideration any mitigating measures) (2-1 decision); *Cline v. Fort Howard Corp.*, 963 F.Supp. 1075, 1081 n. 6 (E.D.Okla.1997) (recognizing split of authority and determining that "the better reasoned approach in the context of vision is one which evaluates the limitation with regard to the use and effectiveness of corrective devises"); *Gaddy v. Four B Corp.*, 953 F.Supp. 331, 337 (D.Kan.1997) ("EEOC Interpretive Guideline § 1630.2(j)'s pre-medicated perspective is in direct conflict with the ADA's express statutory language . . . "); *Moore v. City of Overland Park*, 950 F.Supp. 1081, 1088 (D.Kan.1996) (same); *Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 872, 881 (D.Kan.1996) (rejecting "without" portion of § 1630.2(j) because "plain language of the ADA conflicts with the EEOC's Interpretive Guidance"); *Schluter v. Industrial Coils, Inc.*, 928 F.Supp. 1437, 1445 (W.D.Wis.1996) ("EEOC's interpretation is in direct conflict with the language of the statute that requires

plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives."); *Coghlan v. H.J. Heinz Co.*, 851 F.Supp. 808, 813 (N.D.Texas 1994) (concluding "EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation"); *See also Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-192 n. 3 (5th Cir.1996) (noting that "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity"); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir.1993) ("[A] person is not handicapped if his vision can be corrected to 20/200."), *cert. denied*, 511 U.S. 1011, 114 S.Ct. 1386, 128 L.Ed.2d 61 (1994); *Sweet v. Electronic Data Sys., Inc.*, No. 95-Civ.-3987, 1996 WL 204471, at *5 (S.D.N.Y.1996) (visual impairment of 20/20 in one eye and correctable to 20/80 in other eye does not qualify as a "disability" because it does not substantially limit ability to participate in any major life activity); *Deckert v. City of Ulysses*, No. 93-1295, 1995 WL 580074 (D.Kan. Sept. 6, 1995) (rejecting EEOC interpretation), aff'd on other grounds, > 105 F.3d 669 (Table) (10th Cir.1996).

We join those courts which have rejected this portion of § 1630.2(j) of the EEOC's Interpretive Guidance. We hold that this portion of the EEOC's Interpretive Guidance is in direct conflict with the plain language of the ADA. The determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual. In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective measures.

This portion of the EEOC's Interpretive Guidance is not only in direct conflict with the statute, but is also internally inconsistent with other portions. In discussing "substantially

limit" generally, the Interpretive Guidance states: Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . .

The ADA and this part, like the Rehabilitation Act of 1973, do not attempt a "laundry list" of impairments that are "disabilities." The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease-or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors. 29 C.F.R. § 1630, App. § 1630.2(j) para 1-2 (emphasis added). Thus, the EEOC recognized it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA.

Furthermore, in discussing whether an individual is disabled under the "regarded as" prong of the ADA, 42 U.S.C. § 12102(2)(C), because the employer "regards" the individual as having a substantially limiting impairment when in fact the individual's impairment is not substantially limiting, the Interpretive Guidance uses the example of "an employee [who] has controlled high blood pressure that is not substantially limiting." *Id.* at § 1630.2(l) para. 6 (emphasis added). Under this example, the employee is not actually disabled because in the controlled state the impairment does not "substantially limit" a major life activity. The employee's controlled high blood pressure does not affect, in fact, the ability to perform a major life activity.

Accordingly, to state a prima facie case and survive United's motion to dismiss, Plaintiffs' vision in its corrected state must "substantially limit" their major life activity of seeing. Plaintiffs cannot make this showing. It is undisputed that Plaintiffs' corrected vision is "20/20 or better." Thus, while Plaintiffs'

uncorrected vision would undoubtedly "*903 substantially limit" their major life activity of seeing, this is a hypothetical situation. In fact, Plaintiffs do not limit their normal daily activities to those that could be performed with their uncorrected vision. Plaintiffs admit that with their corrective measures they "function identically to individuals without a similar impairment." Plaintiffs merely don their eye glasses (or contact lenses) and go about all their normal daily activities in the same or similar condition, manner, or duration as the average person in the general population. Hence, Plaintiffs can prove no set of facts upon which relief may be granted on this claim. Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major live activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing. *See Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 872, 878 (D.Kan.1996) (defendant "is trying to have it both ways" by claiming he is disabled due to high blood pressure, but that it is controlled sufficiently that he can perform the job).

II. 42 U.S.C. S 12102(2)(C)—Regarded As Disabled

Subparagraph (C) defines a "disability," as "being regarded as having" a physical or mental impairment that substantially limits one or more of the major life activities of the individual. 42 U.S.C. § 12102(2)(C). The regulations provide three ways an individual is "regarded as" being disabled: (1) the individual: "[h]as a physical or mental impairment that does not substantially limit major life activities but is treated . . . as constituting such limitation;" (2) the individual "[h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;" or (3) the individual "[h]as none of the impairments defined in [29 C.F.R. § 1630.2(h)(1) and (2)] but is treated . . . as having a substantially limiting impairment." 29 C.F.R. § 1630.2(l)(1)-(3). *See MacDonald*, 94 F.3d at 1444 (quoting and adopting 29 C.F.R.

§ 1630.2(l)). "Thus, [a] person is regarded as having 'an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment,' " regardless of whether the individual actually has an impairment. MacDonald, 94 F.3d at 1444 (quoting *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir.1995) (citation omitted)). The focus is on the impairment's or the perceived impairment's effect upon the attitudes of others. *Id. See Gordon v. E.L. Hamm & Assocs., Inc.*, 100 F.3d 907, 913 (11th Cir.1996).

In this case, Plaintiffs contend United "regards" them as disabled in the major life activity of working. [FN9] Plaintiffs assert that United perceives them as unfit to work as global airline pilots because: (a) United's policy is not limited to certain pilot positions, aircraft, or routes but encompasses all pilot positions; (b) United presumed without substantiation that they cannot perform the functions of the job; and (c) United disqualified them based on "myth, fear or stereotype" that individuals with uncorrected vision of worse than 20/100 constitute a safety hazard. In addition, Plaintiffs argue that other global airlines have similar or higher uncorrected vision standards than United, thus blocking Plaintiffs from seeking the same class of employment elsewhere in the industry.

FN9. In their Opening Brief, Plaintiffs assert that "United regards [them] as substantially impaired in the major life activity of seeing, working, or both." (Plaintiffs-Appellants' Opening Brief at 15). However, in their Amended Complaint, Plaintiffs' claim is limited to whether United regards them as substantially limited in the major life activity of working. (Plaintiffs-Appellants' Appendix at 9-10). In reviewing the grant of a motion to dismiss, we are concerned only as to whether Plaintiffs' complaint states a claim upon which relief may be granted. *Yoder*, 104 F.3d at 1224. Therefore, we consider only the claim found in Plaintiffs' Amended Complaint, i.e., whether United regards Plaintiffs as substantially limited in the major life activity of working.

United responds that it did not regard them as disabled. United argues that it did not regard Plaintiffs as substantially limited in the major life activity of working because its requirement did not preclude Plaintiffs from a "class of job." United contends that *904 Plaintiffs merely "fail[ed] to meet the rational job-related safety requirements of the positions they s [ought]."

An employer does not necessarily regard an employee as substantially limited in the major life activity of working simply because it believes that individual is incapable of performing a particular job. The statutory requirement that the employer regard the employee as having a substantially limiting impairment indicates that the an employer regards an employee as substantially limited in the ability to work when the employer regards the employee's impairment or perceived impairment as foreclosing generally the type of employment involved. *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 806 (5th Cir.1997). *See Hileman v. City of Dallas, Tex.*, 115 F.3d 352, 354 (5th Cir.1997) ("An impairment must substantially limit employment in general, not merely the particular job that the plaintiff may wish to hold.").

In order "[t]o demonstrate that an impairment 'substantially limits' the major life activity of working, an individual must show significant[ ] restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'" *Bolton*, 36 F.3d at 942 (quoting 29 C.F.R. § 1630.2(j)(3)(i)). *See MacDonald*, 94 F.3d at 1444 (quoting *Bolton*). A "class of jobs" is defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B). *See Siemon*, 117 F.3d at 1176 (quoting 29 C.F.R. § 1630.2(j)(3)(ii)(B)); *MacDonald*, 94 F.3d at 1444-45 (same). A "broad range of jobs in various classes" is

defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(ii)(C). *See Siemon*, 117 F.3d at 1176 (quoting 29 C.F.R. § 1630.2(j)(3)(ii)(C)); *MacDonald*, 94 F.3d at 1445 (same). However, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i). *See Siemon*, 117 F.3d at 1176 (quoting 29 C.F.R. § 1630.2(j)(3)(i)); *MacDonald*, 94 F.3d at 1445 ("If neither of these definitions is met, and an individual instead shows only that he is unable 'to perform a single, particular job,' . . . the regulations and case law make clear that he has not shown that he is substantial[ly] limit[ed] in the major life activity of working.'"); *Wooten*, 58 F.3d at 386 (holding that under the ADA, "'working' does not mean working at a particular job of that person's choice"); *Bolton*, 36 F.3d at 942 (quoting 29 C.F.R. § 1630.2(j)(3)(i)); *Welsh*, 977 F.2d at 1419 (holding that "an impairment that an employer perceives as limiting an individual's ability to perform only one job is not a handicap under the Act").

Therefore, in order to establish a disability under the "regarded as" prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes. In this case, we are concerned with whether Plaintiffs can present any set of facts based on their Amended Complaint establishing that United treated Plaintiffs as having a substantially limiting impairment. To do so, Plaintiffs must establish United's disqualification of them from all pilot positions as a significant restriction on their ability to perform a class of jobs. [FN10] *See Foreman*, 117 F.3d at 806 ("the question is whether Foreman was treated by [defendants] as having an impairment that substantially limits a major life activity"); *MacDonald*, 94 F.3d at 1445 (concluding that to establish a disability plaintiff must show

defendant regarded him as being substantially limited in performing a class of jobs). We hold that Plaintiffs cannot make this showing. Taking all Plaintiffs' allegations as true, Plaintiffs can establish only that their physical impairment, their uncorrected vision, prevents them from working for United as a pilot; a single, particular job. They cannot show disqualification from a "class of jobs."

FN10. At oral argument, United stated that Plaintiffs were not disqualified from its non-passenger pilot positions. However, for the purposes of this appeal, we will assume Plaintiffs were disqualified from "all pilot positions" as they alleged in their Amended Complaint.

We are concerned with whether United regards Plaintiffs as "disabled," not whether the airline industry as a whole regards individuals with uncorrected vision of 20/100 or worse as "substantially limited" in a major life activity. It is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters. *See Cook*, 10 F.3d at 25-26 (using example demonstrating focus is on employer in question not other employers in the industry). However, we do examine the airline industry to assist in determining whether Plaintiffs' impairment substantially limits their employment generally in a "class of jobs."

The "class of jobs" Plaintiffs argue United disqualifies them from is that of "global airline pilot." However, this description is too narrow to constitute "class of jobs." A "class of jobs" consists of jobs that utilize "similar training, knowledge, skills or abilities." 29 C.F.R. § 1630, App. § 1630.2(j)(3)(ii)(B). As Plaintiffs' point out in their Amended Complaint, "[t]here is nothing unique about the job activities of United pilots that distinguishes United's requirements from other airlines." (Plaintiffs-Appellants' Appendix at 10, P 38(g)). Thus, the "class of jobs" to which Plaintiffs must compare themselves is that of all pilot positions at all airlines, because they all require the same or similar training, knowledge, skills, or abilities. This class would include, but not

be limited to, all pilot positions at global airlines, national airlines, commuter/regional airlines, and cargo/courier airlines. *See e.g. McKay v. Toyota Motor Mfg.*, U.S.A., Inc., 110 F.3d 369, 373 (6th Cir.1997) (class of jobs at issue included all manufacturing jobs not only narrow range of assembly line manufacturing jobs requiring repetitive motion or frequent lifting of more than ten pounds); *MacDonald*, 94 F.3d at 1445 ("[T]axiing aircraft is neither 'a class of jobs,' nor 'a broad range of jobs in various classes,' but is instead 'a single, particular job.'"); *Wooten*, 58 F.3d at 386 (concluding plaintiffs' carpal tunnel syndrome "prevent[ed] him from performing a narrow range of meatpacking jobs"); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727 (5th Cir.1995) (arm impairment did not prevent plaintiff from working in entire class of welding jobs, only those requiring substantial climbing); *Welsh*, 977 F.2d at 1419 ("an impairment that an employer perceives as limiting an individual's ability to perform only one job [firefighter] is not a handicap").

For example, "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. § 1630, App. § 1630.2(j) para. 15. With this example, the EEOC illustrates an individual who is "not substantially limited in the ability to perform any other major life activity and, with regard to working, [is] only unable to perform either a particular specialized job or a narrow range of jobs." *Id. See Bolton*, 36 F.3d at 942 (quoting 29 C.F.R. § 1630.2(j)(3)(i) and *Welsh*); *Welsh*, 977 F.2d at 1419 (inability "to perform only one job is not a handicap under the [Rehabilitation] Act"); *Daley*, 892 F.2d at 215 ("Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity."); *Forrisi*, 794 F.2d at 934 ("an employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job"); *Tudyman*, 608 F.Supp. at 746 (concluding "refusal to hire someone for a single job does not in and of itself constitute perceiving the [person] as a handicapped individual").

Adopting Plaintiffs' reasoning would imply that anyone who failed to obtain a single job because of a single requirement of employment would become a "disabled" individual because the employer would thus be regarding the applicant's failure as substantially limiting in the major life activity of working. *Forrisi,* 794 F.2d at 935. *See Kelly v. Drexel Univ.*, 94 F.3d 102, 109 (3d Cir.1996) (stating that "otherwise . . . anyone[ ] could establish a prima facie discrimination case merely by demonstrating some adverse action against the individual and that the employer was aware that the employee's characteristic placed him or her in [a protected] group"). This reading would stand the Act on its head. This provision of the ADA seeks to remedy perceived disabilities that, like actual disabilities, extend beyond the isolated mismatch of employer and employee. We agree with the court's sentiments expressed in > Hileman, "[w]e refuse to construe the . . . Act as a handout to those who are in fact capable of working in substantially similar jobs . . . " *Hileman,* 115 F.3d at 354 (discussing Rehabilitation Act).

Finally, we note that while the FAA may not believe there is a safety concern regarding pilots with uncorrected vision of 20/100 or worse, that alone does not prevent United from presenting evidence to the contrary, were it necessary to refute a prima facie case of discrimination. As long as United does not practice illegal discrimination, we discern no reason why United cannot maintain a higher standard for safety than the FAA. It must be remembered that the FAA sets the minimum criteria for a pilot's license, not the maximum. Conclusion

We hold that Plaintiffs' Amended Complaint alleged sufficient facts to support a conclusion that their uncorrected vision constituted a physical impairment under the ADA. However, for the foregoing reasons, we hold that Plaintiffs cannot present any set of facts showing their vision, when viewed with mitigating and corrective measures, substantially limits the major life activity of seeing. Nor can Plaintiffs show United regarded them as substantially limited in a major life activity of working by finding Plaintiffs unfit for its commercial pilot positions. Therefore, we

affirm the district court's dismissal of Plaintiffs' ADA claims for failure to state a claim upon which relief may be granted.

AFFIRMED.

United States Court of Appeals for the Tenth Circuit

KAREN SUTTON AND KIMBERLY HINTON,

Plaintiffs-Appellants,

v.

UNITED AIR LINES, INC.,

Defendant-Appellee.

Case No. 96-1481.

ORDER

Filed March 3, 1998.

Before BRORBY, BARRETT, AND MCKAY,

Circuit Judges.

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of the Court

by: _____
Deputy Clerk

KAREN SUTTON AND KIMBERLY HINTON,

Plaintiffs,

v.

UNITED AIRLINES, INC.,

Defendant.

Civ. A. No. 96-S-121.
United States District Court, D. Colorado.
Aug. 28, 1996.

Tucker K. Trautman, Shawn D. Mitchell, Ireland, Stapleton, Pryer & Pascoe, P.C., Denver, for Plaintiffs.

Lisa Hogan, Brownstein Hyatt Farber & Strickland, P.C., Denver, for Defendant.

MEMORANDUM OPINION AND ORDER

SPARR, District Judge.

THIS MATTER comes before the court on the Defendant's Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) (filed February 29, 1996). The court has reviewed the motion, the Plaintiffs' opposition (filed April 8, 1996), the Defendant's reply (filed May 1, 1996), the Amended Complaint (filed July 18, 1996), and the applicable law and is fully advised in the premises.

1. Standard of Review

In reviewing a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), a district court's role is to assess the legal feasibility of the complaint; it is not to weigh the evidence which might be offered at trial. In considering the legal feasibility of the complaint, a court may only consider the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters of which judicial notice may be taken. *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 15 (2d Cir.1993). Applying Fed.R.Civ.P. 12(b)(6), a court should not dismiss a

cause of action for failure to state a claim unless the court determines that the plaintiff can prove no set of facts that would entitle it to relief, even when all well- pleaded allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 528-29 (10th Cir.1992); *Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n.*, 908 F.2d 578, 582 (10th Cir.1990); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1148 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). So long as the plaintiff can offer evidence in support of a legally recognized claim for relief, a motion to dismiss must be denied. *Hiatt v. Schreiber*, 599 F.Supp. 1142, 1145 (D.Colo.1984).

2. The Plaintiffs' Claim

The Plaintiffs' Amended Complaint alleges a single claim for violation of the Americans with Disabilities Act, 42 U.S.C. S 12101 et seq., ("the ADA"). Plaintiffs are twin sisters who are currently employed as commercial airline pilots. Plaintiffs have applied to Defendant United for employment as passenger airline pilots, but have been rejected for such employment because they do not meet United's minimum uncorrected vision requirements. United requires its passenger airline pilots to have uncorrected vision of 20/100 or better. Each Plaintiff has uncorrected vision of 20/200 or worse in her right eye and 20/400 or worse in her left eye. [FN1] Plaintiffs claim that they are qualified for the positions for which they applied because, with corrective lenses, they have vision that is 20/20 or better. Plaintiffs allege United is violating the ADA by rejecting them on the basis of a disability or because United regards them as having a disability.

FN1. A person with visual acuity of 20/200 can see an object from 20 feet only as well as an unimpaired person can see the same object from 200 feet. If the visual acuity is 20/400, then the impaired individual standing 20 feet away sees the same image as the unimpaired person sees from 400 feet. Corrected visual acuity of 20/200 or less constitutes legal blindness for purposes of Supplemental Security Insurance disability classification. (Amended Complaint paragraphs 37. b. and c.)

3. Statutory Framework

The ADA forbids discrimination: against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a) (1996). In order to state a claim under the ADA, a plaintiff must establish: (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability. *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1123 (10th Cir.1995), quoting *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir.1995). [FN2]

FN2. The language adopted in the ADA tracks that of the Rehabilitation Act of 1973, 29 U.S.C. S 701 et seq. The ADA expressly requires its provisions to be interpreted in a way that "prevents imposition of inconsistent or conflicting standards for the same requirements" under the two statutes. 42 U.S.C. S 12117(b). Congress intended relevant caselaw developed under the Rehabilitation Act to be generally applicable to analogous inquiries under the ADA. *White*, 45 F.3d at 360; *Bolton v. Scrivener, Inc.*, 36 F.3d 939, 942-43 (10th Cir.1994), *cert. denied*, 115 S.Ct. 1104 (1995); House Report No. 101-485(I) p. 50, reprinted in 1990 U.S.C.C.A.N. 332.

The court must begin by determining whether Plaintiffs are disabled as defined by the ADA. The ADA defines "disability" using three alternatives:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment. 42 U.S.C. § 12102(2) (1996). *See also Bolton*, 36 F.3d at 942. Plaintiffs argue that they are disabled and additionally that

United regarded them as being disabled. United argues that the Plaintiffs are not disabled because they have no impairment which substantially limits any major life activities. Plaintiffs claim they are, and United regards them as being, substantially limited in the major life activity of seeing (Amended Complaint paragraphs 37, 38; Plaintiffs' opposition brief pp. 2, 3, 6 n. 2, 12).

Although the ADA does not define "physical impairment," "substantially limits," "major life activities," or "being regarded as having such an impairment," the regulations promulgated by the Equal Employment Opportunity Commission (EEOC) pursuant to the ADA provide significant guidance. *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 190 (5th Cir.1996) (citation omitted). The regulations define "physical impairment" to include:

> Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; . . .

29 C.F.R. § 1630.2(h)(1) (1996).

> "Major life activities" means:
>
> functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

29 C.F.R. § 1630.2(i). The appendix to the regulations provides that "other major life activities include, but are not limited to, sitting, standing, lifting, reaching." 29 C.F.R. Pt. 1630, Appendix to Part 1630—Interpretive Guidance to Title I of the ADA, § 1630.2(i) (1996).

> The term "substantially limited" means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or

> (ii) Significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). Whether an individual is substantially limited in a major life activity is determined in light of:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

> "Being regarded as having such an impairment means:
>
> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward impairment; or
>
> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having substantially limiting impairment.

29 C.F.R. § 1630.2(l).

4. Analysis

The issue is whether the Plaintiffs' impairment substantially limits any of their major life activities or whether United regards the Plaintiffs as having such an impairment, such that they are disabled as defined by the ADA. The court must consider the extent to which their impairment restricts their specific activities.

EEOC Compliance Manual § 902.4(a) (1995). Obviously, the Plaintiffs' ability to see without correction is affected, but, as reflected in the statute and regulations, far more is required to trigger coverage under 42 U.S.C. § 12102(2)(A) and (C).

First, Plaintiffs do not claim any restrictions on their activities other than their inability to obtain employment as passenger airline pilots for United. Plaintiffs do not allege that they have any medical restrictions. Plaintiffs do not allege any activity that they are unable to perform that the average person in the general population can perform, nor do they state that they suffer from any significant restrictions in any activities as compared to the average person. See 29 C.F.R. § 1630.2(l)(i) and (ii). Indeed, they are currently employed as commercial airline pilots. Plaintiffs concede that, with their corrective lenses, they are able to function identically to individuals without a similar impairment. An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the factors in 29 C.F.R. § 1630.2(j)(2), does not amount to a significant restriction when compared with the abilities of the average person. 29 C.F.R. Pt. 1630 App. § 1630.2(j).

Second, numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities. *Roth v. Lutheran Gen'l Hosp.*, 57 F.3d 1446, 1454-56 (7th Cir.1995) (doctor with strabismus (crossed eyes) was not disabled because he could read, write, lecture, and successfully complete graduate school); *Chandler v. City of Dallas,* 2 F.3d 1385, 1390 (5th Cir.), *reh'g denied*, 9 F.3d 105 (1993), cert. denied, 114 S.Ct. 1386 (1994) (vision correctable to 20/200 is not a "handicap" under the Rehabilitation Act); *Jasany v. United States Postal Serv.*, 755 F.2d 1244, 1248-50 (6th Cir.1985) (plaintiff with crossed eyes who had difficulty operating mail-sorting machine but who otherwise was not limited in work or recreation was not "handicapped" under the Rehabilitation Act); *Venclauskas v. Connecticut Dept. of Pub. Safety*, 921 F.Supp. 78, 80-82 (D.Conn.1995) (applicant for state police trooper trainee who was rejected for failure to meet unaided visual acuity

standard failed to state a claim under the ADA or the Rehabilitation Act); *Joyce v. Suffolk County,* 911 F.Supp. 92, 96 (E.D.New York 1996) (candidate for county police officer position who failed to meet visual acuity standard because his uncorrected vision in each eye was 20/200 but his corrected vision in each eye was 20/20 was not "handicapped" or "disabled" under the ADA or the Rehabilitation Act); *Walker v. Aberdeen-Monroe County Hosp.,* 838 F.Supp. 285, 288 (N.D.Miss.1993) (a person whose vision is corrected to 20/30 is not "handicapped" within the meaning of the Rehabilitation Act); *Sweet v. Electronic Data Systems, Inc.*, 1996 WL 204471, 5 A.D.Cases 853 (S.D.N.Y. April 26, 1996) (plaintiff's diminished vision in one eye did not qualify as a "disability" because it did not substantially limit his ability to participate in any major life activity). Even accepting all of the Plaintiffs' allegations as true, Plaintiffs have not stated a claim that they are substantially limited in the major life activity of seeing.

Third, the determination of whether a person's impairment is substantially limiting should first address major life activities other than working. If it is clear that a person's impairment substantially limits a major life activity other than working, then one need not determine whether the impairment substantially limits the person's ability to work. On the other hand, if an impairment does not substantially limit any of the other major life activities, then one must determine whether the person is substantially limited in working. EEOC Compliance Manual § 902.4(c). With respect to the major life activity of working, the term "substantially limits" means:

> significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3) (1996) (emphasis added). The major life activity of working does not necessarily mean working at the job

of one's choice. *Bolton*, 36 F.3d at 942, citing *Welsh v. City of Tulsa*, 977 F.2d 1415 (10th Cir.1992); *E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088, 1099 (D.Hawaii 1980). In addition to the factors listed in 29 C.F.R. § 1630.2(j)(2), the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working:"

> (A) The geographical area to which the individual has reasonable access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

29 C.F.R. § 1630.2(j)(3)(ii) (1996).

The Plaintiffs' entire complaint is based on their inability to obtain the single, particular job of passenger airline pilot with United. Plaintiffs are currently employed as commercial airline pilots, jobs that utilize training, knowledge, skills, and abilities similar to the job of passenger airline pilot. Under the statutory factors to be considered by the court, it is clear that the Plaintiffs cannot state a claim that they are substantially limited in the major life activity of working. The Plaintiffs' common moderate vision impairment, although certainly an undesirable inconvenience, does not substantially limit their ability to work within the meaning of the ADA.

Plaintiffs argue that the ADA regulations require that the existence of a disability be determined without regard to the effects of mitigating measures such as drugs or prosthesis, citing 29 C.F.R. Pt. 1630, App. § 1630.2(h). The court recognizes that App. § 1630.2(j) provides that "[the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630, App. § 1630.2(j); EEOC Compliance Manual § 902.4(c)(1). However, the part of the EEOC's interpretation of the regulations that Plaintiffs rely upon addresses impairment, not disability, stating that the existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. Even if the Plaintiffs' uncorrected vision would be considered an impairment, a physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA because the statute requires an impairment that substantially limits one or more of the major life activities. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir.1995). If the impairment does not significantly restrict a major life activity, then the impairment is not a disability. EEOC Compliance Manual § 902.4(c)(1).

Fourth, it is apparent that the ADA was intended to protect only a limited class of persons; specifically, individuals who suffer from impairments significantly more severe than those encountered by the average person in everyday life, not people who suffer from slight shortcomings that are both minor and widely shared. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir.1986); *Buko v. American Medical Laboratories, Inc.*, 830 F.Supp. 899, 904 (E.D.Va.1993), *aff'd*, 28 F.3d 1208 (4th Cir.1994). An excerpt from the legislative history of the ADA reveals that the type of visual impairment contemplated by the legislation is of a degree beyond that correctable by eyeglasses or contact lenses:

> For blind and visually-impaired persons, reasonable accommodations may include adaptive hardware and software for computers, electronics [sic] visual aids,

braille devices, talking calculators, magnifiers, audio recordings and brailled material.

House Report No. 101-485(II) p. 64, reprinted in 1990 U.S.C.C.A.N. 346. To adopt a definition of "disabled" that would include persons whose vision is correctable by eyeglasses or contact lenses would result in an expansion of disability protection beyond the logical scope of the ADA. Millions of Americans suffer visual impairments no less serious than those of the Plaintiffs. Under such an expansive reading, the term "disabled" would become a meaningless phrase, subverting the policies and purposes of the ADA and distorting the class the ADA was meant to protect.

Fifth, Plaintiffs cannot state a claim that United "regarded" them as being disabled. There is no support for the allegation that United, based on stereotype, myth, or unsubstantiated fears, regarded Plaintiffs as substantially impaired in the major life activity of seeing. As for the major life activity of working, the proper test for a "regarded as" claim is whether the impairment, as perceived, would affect the individual's ability to find work across the spectrum of same or similar jobs. *Muller v. Automobile Club of Southern California*, 897 F.Supp. 1289, 1297 (S.D.Calif.1995) (citation omitted); *Venclauskas*, 1995 WL 819137 at *3-4 (citations omitted). An employer does not necessarily regard an employee as handicapped simply by finding the employee to be incapable of satisfying the singular demands of a particular job. *Ellison*, 85 F.3d at 192, quoting *Forrisi*, 794 F.2d at 933-34. An employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on the employee's ability to work in general. *Hutchinson v. United Parcel Service, Inc.*, 883 F.Supp. 379, 396 (N.D.Iowa 1995). The statutory reference to a substantial limitation indicates instead that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of

employment involved. *Ellison*, 85 F.3d at 192, quoting *Forrisi*, 794 F.2d at 934; EEOC Compliance Manual § 902.8(f).

At most, the Plaintiffs can establish that United regarded them as unable to satisfy the requirements of a particular passenger airline pilot position. The Plaintiffs have had no difficulty obtaining other jobs in their field prior to this one. Plaintiffs are currently employed as commercial airline pilots. The need for corrective eyewear in no way substantially limits the Plaintiffs' employment generally. *Joyce*, 911 F.Supp. at 96.

Finally, the Plaintiffs indicate that United's visual acuity standards are based on its "misunderstanding" of certain government regulations. However, the ADA does not require United to lower or effect substantial modifications of its standards to accommodate disabled persons. *See Southeastern Community College v. Davis*, 442 U.S. 397, 413-14 (1979). Even if the Plaintiffs were disabled within the meaning of the statute, the ADA does not authorize the court to compel the airlines to alter the qualifications for passenger airline pilots.

The court concludes that the Plaintiffs cannot state a claim that United regarded them as impaired in a way that substantially limits a major life activity and, therefore, cannot state a claim that they are disabled under the ADA.

5. Conclusion

Even after accepting all factual allegations as true and drawing all reasonable inferences in favor of the Plaintiffs, the court concludes that the Plaintiffs cannot state a claim under the ADA. Plaintiffs do not support their claim with facts that would prove that they are disabled under the ADA, and therefore, that they are entitled to any relief under the ADA.

Accordingly, IT IS ORDERED:

1. The Defendant's Motion to Dismiss is GRANTED.

2. This civil action is DISMISSED.

3. Upon the filing of a bill of costs with the Clerk of the Court, the Defendant shall be entitled to recover from the Plaintiffs its costs in this action.